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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RICH HILL and ENZA HILL,

Petitioners,

v.

GATEWAY 2000, INC. and DAVID PRAIS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI OF RICH HILL AND ENZA HILL

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals improperly ignore state law of contract formation when it determined that an arbitration clause unilaterally imposed by the vendor and buried within hundreds of pages of important documents shipped along with goods purchased by a consumer, without any other notice to the consumer, was part of the written agreement for purchase of those goods absent explicit agreement to arbitrate by the consumer?

2. Must a court enforce an arbitration clause that acts to prevent any effective redress for misrepresentations made by the party proposing arbitration and that is therefore both an integral part of the scheme to defraud via the misrepresentations and itself fraudulently induced?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
PREVIOUS OPINIONS	1
STATEMENT OF JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	2
Facts	2
Proceedings in the Lower Courts	5
ARGUMENT	7
I.	
PROBLEMS IN IMPOSING ARBITRATION ON CONSUMERS	7
II.	
THE RELEVANT STATE LAW OF CONTRACT FORMATION INDICATES THAT THERE WAS NO AGREEMENT TO ARBITRATE	9
III.	
THE ARBITRATION CLAUSE WAS BOTH AN INTEGRAL PART OF THE SCHEME TO DEFRAUD AND ITSELF FRAUDULENTLY INDUCED	19
CONCLUSION	24
APPENDIX	*infra*

TABLE OF AUTHORITIES

CASES

PAGE

Album Graphics, Inc. v. Beatrice Foods Co., 408 N.E.2d 1041 (Ill. App. 1980) 13

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 7

Barliant v. Follett Corp., 483 N.E.2d 1312 (Ill. App. 1985) 13

C. Itoh & Co. (America), Ltd. v. Jordan Int'l Co., 552 F.2d 1228 (7th Cir. 1977) 10, 11, 13

C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Securities Corp., 912 F.2d 1563 (6th Cir. 1990) 21

Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) 18

Champ v. Siegel Trading Co., Inc., 55 F.3d 269 (7th Cir. 1995) 23

Coastal Indus., Inc. v. Automatic Steam Products Corp., 654 F.2d 375 (5th Cir. 1981) 10, 13

Cole v. Burns Int'l Security Servs., 105 F.3d 1465 (D.C. Cir. 1997) 9, 23

Diskin v. J.P. Stevens & Co., 836 F.2d 47 (1st Cir. 1987) 10, 13

First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920 (1995) 9

Ford Motor Credit Co. v. Russell, 519 N.W.2d 460 (Minn. App. 1994) 16

Frances Hosiery Mills, Inc. v. Burlington Indus., Inc., 204 S.E.2d 834 (N.C. 1974) 11

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 7, 9

Hill v. Gateway, Inc., 105 F.3d 1147 (7th Cir. 1997) 1, 16

Hill's Pet Nutrition, Inc. v. Fru-Con Constr. Corp., 101 F.3d 63 (7th Cir. 1996) 14, 17

Hullum v. Sherbondy, 1991 U.S. App. LEXIS 7826 (9th Cir. Apr. 23, 1991) 21, 22

Marlene Indus. Corp. v. Carnac Textiles, Inc., 380 N.E.2d 239 (N.Y. 1978) 10, 11

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 7

Moseley v. Electronic & Missile Facilities, Inc., 374 U.S. 167 (1963) 19

N&D Fashions, Inc. v. DHJ Indus., Inc., 548 F.2d 722 (8th Cir. 1976) 10

Osage Homestead, Inc. v. Sutphin, 657 S.W.2d 346 (Mo. App. 1983) 16

Perry v. Thomas, 482 U.S. 483 (1987) 10

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 19-22

ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) 16-18

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) . 21, 22

Schubtex, Inc. v. Allen Snyder, Inc., 399 N.E.2d 1154 (N.Y. 1979) 10

Schulze & Burch Biscuit Co. v. Tree Top, Inc., 831 F.2d 709 (7th Cir. 1987) 10, 11, 13, 14

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) 21, 22

Steinberg v. Chicago Medical School, 371 N.E.2d 634 (Ill. 1977) 16

Supak & Sons Mfg. Co. v. Pervel Industries, Inc., 593 F.2d 135 (4th Cir. 1979) 10

Touraine Partners v. Kelly, 482 A.2d 240 (Pa. Super. 1984) 16

Trans-Aire Int'l Inc. v. Northern Adhesive Co., 882 F.2d 1254 (7th Cir. 1989) 11

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 7

Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989) 9

Wheat, First Securities, Inc. v. Green, 993 F.2d 814 (11th Cir. 1993) 10

STATUTES AND RULES

Federal Arbitration Act, 9 U.S.C. § 2-4 ("FAA") . 1

Uniform Commercial Code § 2-207, *codified at* 810 ILCS 5/2-207, S.D. Code § 57A-2-207 ... 1, 2, 10-15, 17

OTHER AUTHORITIES

77A CJS Sales § 31 (1994) 17

Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637 (1996) 8

Restatement (2d) of Contracts § 26 16

Restatement (2d) of Contracts § 33 16

Robert A. Gorman, *The* Gilmer *Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. Ill. L. Rev. 639 8

PREVIOUS OPINIONS

The decision of the United States Court of Appeals for the Seventh Circuit in *Hill v. Gateway, Inc.* is officially reported at 105 F.3d 1147 (7th Cir. 1997) (Easterbrook, J.). The Court of Appeals' denial of the Hills' petition for rehearing and for rehearing *en banc* has not been officially reported. Neither the Trial Court's opinion on arbitrability (the subject of the opinion in the Court of Appeals) nor its opinion on class certification have been officially reported.

STATEMENT OF JURISDICTION

The Court of Appeals filed its decision in this case on January 6, 1997. Plaintiffs timely filed a petition for rehearing on January 21, 1997.[1] The Court of Appeals denied the petition for rehearing on February 3, 1997.

This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Federal Arbitration Act, 9 U.S.C. § 2-4 (reprinted in Appendix).

Uniform Commercial Code § 2-207, *codified at* 810 ILCS 5/2-207, S.D. Code § 57A-2-207 ("§ 2-207"):

> *Additional terms in acceptance or confirmation.*
>
> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within

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[1] January 20, 1997 was a federal holiday (Martin Luther King, Jr. Day).

a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

STATEMENT OF THE CASE

Facts

After purchasing an advertised computer system through mail-order from defendant Gateway 2000, Inc. ("Gateway"), plaintiffs Rich and Enza Hill discovered that the system they received was substantially inferior to the system advertised. Gateway has attempted to enforce an arbitration clause buried in the midst of hundreds of pages of documents shipped with the computer

system, although the Hills never signed an agreement to arbitrate disputes.

On or about September 28, 1995, Mr. and Mrs. Hill purchased Gateway's Tenth Anniversary System through a telephone order and paid by credit card at that time. This computer system was a limited-time "special" advertised at approximately $4,000 in magazines and other media directed to computer buyers (Gateway sells by mail-order). Plaintiffs learned of the special through the advertising. The computer arrived at plaintiffs' residence in early November of 1995.

Gateway's advertisement specified system components including a 6X EIDE CD-ROM Drive, Altec Lansing Surround Sound Speakers with Subwoofer, and a Matrox MGA "Millennium" 2MB Graphics Accelerator. Gateway claimed it would furnish a "new blazing 6X CD-ROM Drive . . . the fastest EIDE CD-ROM *anywhere*" (emphasis in original) and "*the first* speaker system designed to create theater-type surround sound" (emphasis in original). The advertised graphics accelerator is an upgradable video card.

Gateway did not supply what it advertised. Plaintiffs' CD-ROM performed like a 4X drive (which is significantly slower than a 6X drive) and would jam while running a number of programs (requiring a complete reset of the computer system, losing any unsaved work in process). A faster CD-ROM drive was available when Gateway made its claim. The Altec Lansing speakers plaintiffs received did not have "surround sound," although they came in the "surround sound" packaging. The speakers produce static and hiss. After inquiring about this, plaintiffs were informed by Gateway that the "surround

sound" speakers were not available through Gateway, and that it was a "misprint" in the advertisement. Gateway did not supply a Matrox MGA Millennium 2MB Graphics Accelerator, but substituted another less-expensive component from the same manufacturer that was not upgradable, without informing its customers.

It would cost the plaintiffs approximately $1,000 more than they paid (and than Gateway advertised) in order to obtain the actual system advertised by Gateway, including parts and installation. However, opening the computer system's case voids the warranty for the entire system under the terms of the advertised limited warranty. Thus, if an unrelated component (such as, say, the modem) failed after replacement of the substandard components, the purchaser would have no recourse.

Inside the shipping containers, Gateway included a myriad of documents, including hundreds of pages of technical manuals for the computer system itself and software included with it, setup instructions, the limited warranty noted in the advertisement, an invoice, and various shipping documents. Buried in this mass of paper was a four-page document entitled "Standard Terms and Conditions." There was no prior notice of such a document in the advertisement, on the outside of the box, or on the order confirmation that Gateway faxed to plaintiffs.

Paragraph 10 of the "Standard Terms & Conditions," on page 3, reads:

> Any dispute or controversy arising out of or relating to the Agreement or its interpretation shall be settled exclusively and finally by arbitration. The arbitration shall be conducted in accordance with the Rules of Conciliation and Arbitration of the Interna-

> tional Chamber of Commerce. The arbitration shall be conducted in Chicago, Illinois, U.S.A. before a sole arbitrator. Any award rendered in any such arbitration proceeding shall be final and binding on each of the parties, and judgment may be entered thereon in a court of competent jurisdiction.

The "Standard Terms and Conditions" purport to become effective thirty days after receipt of the computer system without any further action by purchasers; rejection would require that the consumer, at the consumer's expense, repackage the computer system and return it to Gateway. The "Standard Terms and Conditions" do not contemplate a signed agreement to be so bound by the purchaser. The Hills did *not* acknowledge or sign an agreement to the "Standard Terms and Conditions."

The rules of the International Chamber of Commerce also require each side to pay an arbitration fee in advance of approximately $2,000—half the list price of the Tenth Anniversary System.

Gateway began including the "Standard Terms and Conditions" in shipping containers for the first time in July of 1995. Gateway began taking orders for the Tenth Anniversary System on the last business day of June, 1995, and did not begin shipping the Tenth Anniversary System until August of 1995.

Proceedings in the Lower Courts

On July 8, 1996, the Hills filed a multi-count RICO class action complaint against defendants Gateway and David Prais in the United States District Court for the Northern District of Illinois (Conlon, J.). Jurisdiction was proper pursuant to 28 U.S.C. § 1331 (federal question).

The Hills filed a motion for class certification on August 2, 1996, which was granted on November 4, 1996.[2]

Meanwhile, Gateway filed a motion to compel arbitration on August 12, 1996. After briefs by both sides, the District Court denied defendants' motion to compel arbitration on August 22, 1996. Defendants then moved to supplement the record and for reconsideration of their motion to compel arbitration. On September 4, 1996, the District Court denied defendants' motion for reconsideration.

Defendants appealed to the Court of Appeals for the Seventh Circuit on September 12, 1996, and moved to stay proceedings in the District Court pending the appeal. Jurisdiction in the Court of Appeals was proper pursuant to 9 U.S.C. § 16 (providing for interlocutory appeal upon denial of a motion to compel arbitration). After the District Court denied defendants' motion to stay proceedings pending the appeal, defendants presented an emergency motion to stay proceedings in the District Court to this Court. The Court of Appeals denied defendants' emergency motion to stay on October 9, 1996, and designated the matter for expedited consideration.

In its opinion, the Court of Appeals reversed the District Court, holding that the arbitration clause bound the Hills despite the absence of any signed agreement to arbitrate. The Hills timely filed a petition for rehearing, which was denied on February 3, 1997.

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[2] Class certification was not considered by the Court of Appeals and is outside the scope of this Petition.

ARGUMENT

Arbitration between parties who have agreed to arbitrate can be an efficient means of resolving disputes without requiring allocation of judicial resources. However, in this case, the Hills did not sign an agreement to arbitrate disputes with Gateway over the computer system. The Court of Appeals incorrectly held that Gateway could materially alter the agreement to purchase a computer system to prevent effective relief from its practice of shipping computer systems substantially inferior to those advertised.

I.

PROBLEMS IN IMPOSING ARBITRATION ON CONSUMERS.

One preliminary issue that should be considered in this matter—which received short shrift in the Court of Appeals—is the context of the arbitration clause. This case does not involve an employment contract. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (individual employment contract); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (collective bargaining). Neither does it involve a signed arbitration agreement. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (agreement between commercial parties). Instead, it concerns an arbitration clause secreted in documents accompanying a one-time consumer purchase. It is unlike this Court's recent opinion in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), because the consumers in *Dobson* actually signed an arbitration agreement.

Whether "agreements" to arbitrate consumer disputes are appropriate at all is open to question. As one commentator remarked,

> Large companies such as banks, hospitals, brokerage houses and even pest exterminators are increasingly including mandatory binding arbitration clauses in the fine print contracts they require all customers, employees, franchisees and other little guys to sign. While legal commentators are beginning to take note of such clauses, the general public remains quite unaware of the importance of such agreements. Yet, from a practical standpoint, the arbitration clauses are crucial in that they not only bar judicial relief but also may allow companies to select the arbitrators, set the arbitration in a location convenient for the company but not for the little guy, exclude certain recoveries such as punitive damages, shorten the statute of limitations, deny discovery and other procedural protections, and eliminate virtually any right to appeal.

Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 637-38 (1996); *see also* Robert A. Gorman, *The* Gilmer *Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. Ill. L. Rev. 639, 645 ("[D]espite the strong FAA policy of ordering arbitration hearings and implementing arbitration awards, minimal standards of procedural fairness must be satisfied before a civil action may be stayed and arbitration ordered . . .").

The disparity in knowledge and bargaining power between a multinational manufacturer of computer systems and a consumer indicates that a court should scrupulously inquire into both (1) whether the consumer did, in

fact, agree to arbitrate disputes, and (2) whether the procedures imposed by any such agreement allow the consumer to "effectively . . . vindicate [his or her] statutory cause of action in the arbitral forum." *Gilmer*, 500 U.S. at 28 (bracketed text in original, internal quotation omitted); *see also Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1481-83 (D.C. Cir. 1997).

II.

THE RELEVANT STATE LAW OF CONTRACT FORMATION INDICATES THAT THERE WAS NO AGREEMENT TO ARBITRATE.

The first question properly before this Court is quite simple: Did the Hills agree to arbitrate disputes arising from their purchase of a Tenth Anniversary System from Gateway? Absent an agreement to arbitrate, the Hills are not required to do so. *First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1924 (1995) ("arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration"); *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478 (1989) (the FAA "does not require parties to arbitrate when they have not agreed to do so"). Prior to committing a matter to arbitration, therefore, a court must first find that the parties agreed to arbitrate the dispute in question:

> It is, therefore, rudimentary that "the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." [citation omitted] Section 4 of the FAA supports this conclusion. This section, which provides

a federal remedy to a party seeking to compel compliance with an arbitration agreement, specifies that:

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . *If the making of the arbitration agreement or the failure, neglect or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.*

Wheat, First Securities, Inc. v. Green, 993 F.2d 814, 817 (11th Cir. 1993) (emphasis and ellipses in original).

The existence of a valid agreement to arbitrate is governed by state law, as long as state law does not single out arbitration agreements for special burdens. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("Thus state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally"). Before the Court of Appeals issued its opinion below, UCC § 2-207 governed whether an arbitration clause in a printed form document became part of the contract. *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709 (7th Cir. 1987); *Supak & Sons Mfg. Co. v. Pervel Industries, Inc.*, 593 F.2d 135 (4th Cir. 1979); *Diskin v. J.P. Stevens & Co.*, 836 F.2d 47 (1st Cir. 1987); *Coastal Indus., Inc. v. Automatic Steam Products Corp.*, 654 F.2d 375 (5th Cir. 1981); *C. Itoh & Co. (America), Ltd. v. Jordan Int'l Co.*, 552 F.2d 1228 (7th Cir. 1977); *N&D Fashions, Inc. v. DHJ Indus., Inc.*, 548 F.2d 722 (8th Cir. 1976); *see also Schubtex, Inc. v. Allen Snyder, Inc.*, 399 N.E.2d 1154 (N.Y. 1979); *Marlene Indus. Corp. v. Carnac*

Textiles, Inc., 380 N.E.2d 239, 242 (N.Y. 1978); *Frances Hosiery Mills, Inc. v. Burlington Indus., Inc.*, 204 S.E.2d 834, 842-43 (N.C. 1974). All of these decisions held that UCC § 2-207 determines whether an arbitration clause in a printed form is part of the contract. For example, in *C. Itoh, supra*, 552 F.2d at 1236-38, the Court of Appeals held that a seller's arbitration clause did not become part of the contract without the express assent of the buyer, even though the seller's acknowledgment form stated that failure to object was assent. *See also Trans-Aire Int'l Inc. v. Northern Adhesive Co.*, 882 F.2d 1254 (7th Cir. 1989) (discussing *C. Itoh* and *Schulze & Burch* with approval).

The Court of Appeals—*without citing any of these decisions*—asserts that § 2-207 does not apply to this transaction because there was no "exchange" of "forms." However, nothing in UCC § 2-207 requires an exchange of forms. UCC § 2-207 reads:

> *Additional terms in acceptance or confirmation.*
>
> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

While this section does provide a solution to the common-law "battle of the forms" by rejecting the mirror-image rule, its plain language does *not* limit it to exchanges of forms. In fact, no writings need be exchanged at all. The "agreement" referred to in subdivision (1) may be oral, as when the Hills phoned Gateway and ordered a Tenth Anniversary System. All that is required is "[c]onduct by both parties which recognizes the existence of a contract," which is deemed "sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract." UCC § 2-207(3). The "conduct" may be an oral agreement or an order for goods followed by their shipment.

The conduct of the parties in this case is "sufficient to establish a contract for sale." Gateway solicited offers to purchase with its advertisements. The Hills made an offer to purchase and tendered payment by credit card. Gateway accepted the Hills' offer by stating it would ship a computer, faxing an immediate confirmation and then shipping the computer system several weeks later. This conduct clearly establishes a contract for sale.

Illinois decisions[3] apply UCC § 2-207 even when there is no exchange of writings. *Barliant v. Follett Corp.*, 483 N.E.2d 1312 (Ill. App. 1985) (§ 2-207 applied even though the only documents were seller's invoices and packing slips); *Album Graphics, Inc. v. Beatrice Foods Co.*, 408 N.E.2d 1041 (Ill. App. 1980) (similar). The Court of Appeals had previously applied § 2-207 to determine if an arbitration clause became part of a contract when, as in this case, there was an oral agreement followed by a unilateral writing from one party. *Schulze & Burch, supra*. So have other courts. In *Coastal Industries, supra*, the court stated "*Section 2-207 covers situations in which either the parties have reached a prior oral contract and any writings serve only as a memorialization or confirmation of that contract* or the prior negotiations did not establish a contract and the writings themselves constitute the offer and/or acceptance." 654 F.2d at 378 (emphasis added). *Accord, Album Graphics, supra; Diskin, supra*.

The Illinois courts have also held that a document accompanying the goods and purporting to add material terms is ineffective, and cannot be made effective by a demand that the recipient return the goods if it doesn't like the additional terms. *Album Graphics, supra* (warranty disclaimer). So has the Seventh Circuit. *C. Itoh, supra*.

The only question is whether the arbitration clause not mentioned in the ads or the confirmation, but hidden inside the packaging, became part of the contract. Under

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[3] Research has not disclosed any reported South Dakota opinions on point. The text of the South Dakota enactment of § 2-207 is identical to that in Illinois.

UCC § 2-207, the answer to this question is plainly "no." An arbitration clause is a material term. *Schulze & Burch, supra.* The Hills (and virtually all other Tenth Anniversary System purchasers) are consumers, not merchants (the system was intended for family rather than business use). There is no claim that they or anyone else expressly agreed to the arbitration clause.

An additional term in an invoice or similar document in an accepted contract is only a *proposal* for addition to the contract. If sent to an ordinary (non-merchant) consumer, the proposal does not become part of the contract absent affirmative assent by the consumer. If sent to a merchant and not objected to, it becomes part of the contract if, and only if, it is not material. § 2-207(2); *cf. Hill's Pet Nutrition, Inc. v. Fru-Con Constr. Corp.*, 101 F.3d 63, 64 (7th Cir. 1996) (Easterbrook, J.) ("the contract contains only the agreed-on terms; one side cannot use partial agreement to enforce proposals to which the other side did not assent").

Gateway does not contend that plaintiffs (or anyone else) expressly assented to the arbitration provision, but simply asserts that retention of the computer system made the clause binding. Gateway relies on the preamble of its Standard Terms and Conditions, one of the many documents included in the packaging. This statement reads:

> This document contains Gateway 2000's Standard Terms and Conditions. By keeping your Gateway 2000 computer system beyond thirty (30) days after the date of delivery, you accept these Terms and Conditions.

This assumes the conclusion desired by Gateway. Section 2-207 makes additional terms only proposals for addition

to the contract. In addition to proposing an arbitration clause, Gateway also attempts to alter the method of accepting the proposed additional term with another additional term: a waiver of the consumer's right to be bound by material alterations only upon explicit acceptance. A proposed waiver of the right to be bound by material alterations only upon explicit acceptance is itself material and thus binding only under § 2-207(2). Otherwise, one could evade the explicit acceptance requirement of § 2-207(2) by first proposing a waiver of explicit acceptance as a "nonmaterial" change, which would be accepted unless objected to, and then proceeding with other material changes arguing that the parties had agreed that no explicit acceptance was now required. Therefore, the preamble to the Standard Terms and Conditions fails for the same reason as the arbitration clause itself.

The Official Commentary to § 2-207 states that a clause will "materially alter" a contract if it would "result in surprise or hardship if incorporated without express awareness by the other party." UCC § 2-207 Official Comment 4. Arbitration clauses are material terms, and are not binding modifications absent affirmative assent, even against a merchant.

The Court of Appeals' contrary holding—without citing any of the conflicting prior decisions—brings disorder and confusion to the law of contract formation. Nor is the ruling confined to arbitration clauses. There is no reason under contract law, for example, why a seller could not include a statement disclaiming all warranties with the goods and demand that the buyer return them if it doesn't like the disclaimer.

These are not the only ways in which the opinion below is contrary to settled Illinois law. The opinion below depends upon finding that Gateway is the master of the offer. *Hill*, 105 F.3d at 1150 (*citing ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)). This assumes that Gateway was in fact the offeror. On the other hand, the Illinois Supreme Court has held that an advertisement such as Gateway's advertisement for the Tenth Anniversary System is not an offer to sell, but a solicitation of offers to purchase.

> [Assume a] merchant advertises goods for sale at a fixed price. While the advertisement itself is not an offer to contract, it constitutes an invitation to deal on the terms described in the advertisement. . . . Only when the merchant takes the money is there an acceptance of the *offer to purchase*.

Steinberg v. Chicago Medical School, 371 N.E.2d 634, 639 (Ill. 1977) (citations omitted, emphasis added). This is consistent with the majority view that an advertisement is only a solicitation of offers to purchase. *See, e.g.*, *Ford Motor Credit Co. v. Russell*, 519 N.W.2d 460, 462 (Minn. App. 1994) (advertisement or price quotation is not an offer); *Touraine Partners v. Kelly*, 482 A.2d 240 (Pa. Super. 1984) (holding that an advertisement is an "invitation to come and purchase," not an offer); *Osage Homestead, Inc. v. Sutphin*, 657 S.W.2d 346, 351-52 (Mo. App. 1983) (holding, under Missouri and UCC law, that a magazine ad for goods was not an offer); *see generally* Restatement (2d) of Contracts ("Rest.2d Contr.") § 26 Com. b Ill. 1 ("A, a clothing merchant, advertises overcoats of a certain kind for sale at $50. This is not an offer, but an invitation to the public to come and purchase."); Rest.2d Contr. § 33 Com. c ("advertisements and

price quotes are ordinarily not interpreted as offers"); 77A CJS Sales § 31 (1994).

In this case, the Hills offered to purchase a Tenth Anniversary System with specified components advertised by defendants in national media. Gateway accepted the Hills' offer by accepting credit card payment and sending an order confirmation by facsimile transmission. Since the *Hills* are "masters of the offer," it is quite clear that Gateway's attempt to impose an arbitration clause with the delivery of the computer system is a material alteration of the agreement to purchase and thus falls within UCC § 2-207.

The Court of Appeals depended almost exclusively upon *ProCD* for its analysis of contract law, claiming as follows:

> Plaintiffs ask us to limit *ProCD* to software, but where's the sense in that? *ProCD* is about the law of contract, not the law of software. Payment preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors.

105 F.3d at 1149. This both misstates plaintiffs' argument concerning applicability of *ProCD* to this case and assumes its conclusion.

Plaintiffs did not argue that *ProCD* is limited to software. Plaintiffs argued that *ProCD* is limited to transactions involving substantial future performance on specified terms by the parties.[4] Transportation and insurance

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[4] Indeed, although *ProCD* is probably correct on its facts, the statement in the opinion that UCC § 2-207 applies only to cases where there is an exchange of forms is certainly not a correct statement, at least insofar as Illinois law is concerned. *See supra.*

are also examples of this kind of transaction. *See, e.g.*, *Carnival Cruise, Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (concerning a luxury cruise). In each of these examples, the item "sold" is a right to future use without transfer of ownership. For example, the Shutes did not own their cabin on the cruise ship in question; their ticket represented the right to use that cabin in a specified manner at a specified time. Similarly, Mr. Zeidenberg did not own ProCD's software; he owned a license to use that software. On the other hand, there is no time or use restriction—no license—involved in the sale of the computer itself to the Hills.[5]

This points out the main difficulty with applying *ProCD* to this case. The dispute in *ProCD* concerned misuse of the software and violation of the license. This is inherently a question of executory action. The Court of Appeals asserts, however, that the purchase agreement between the Hills and Gateway is equally executory, pointing to the Standard Terms and Conditions as creating additional responsibilities of the parties. This, of course, is circular: the Standard Terms and Conditions create additional responsibilities of the parties if, and

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[5] The Court of Appeals' discussion of the software shipped with computer systems only obfuscates the issue. Each piece of that software comes with a separate license granted by the manufacturer of that software (not Gateway). These license agreements may (or may not) be similar or identical to that at issue in *ProCD*, but they are separate license agreements. The purchaser of the computer system need not use the software that came with the machine (in fact, a substantial portion of Microsoft's software sales are to those dissatisfied with the operating systems supplied with their computers). In any event, the capability of software supplied with the Tenth Anniversary System is not relevant to this lawsuit.

only if, they are assumed to be part of the contract for sale![6]

III.

THE ARBITRATION CLAUSE WAS BOTH AN INTEGRAL PART OF THE SCHEME TO DEFRAUD AND ITSELF FRAUDULENTLY INDUCED.

The second question before this Court is equally simple: If the Hills did agree to arbitrate disputes with Gateway, was that agreement procured by fraud? *Moseley v. Electronic & Missile Facilities, Inc.*, 374 U.S. 167, 171 (1963), held that an arbitration clause that is used to effect a fraudulent scheme is invalid if induced independently from the fraud. This is the precise situation here. The Court of Appeals averred that avoiding *Moseley* "do[es] not require more than a citation to *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)." 105 F.3d at 1150 (parallel citations omitted). But examination of *Prima Paint* discloses that merely citing it as dispositive on the issue of fraud is insufficient. Such a conclusion implies that *Prima Paint* overruled *Moseley*. In fact, this Court explicitly harmonized *Prima Paint* with *Moseley*. *Prima Paint*, 388 U.S. at 404 n.12 ("This position is consistent both with the decision in *Moseley* . . . and with the statutory scheme"). As this Court noted, the critical factual issue in *Prima Paint* was that:

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[6] Any warranty responsibilities are a matter not only of contract law, but the Magnuson-Moss Act. In any event, Gateway fully disclosed the existence of a warranty prior to purchase (the ads mention the warranty). Further, certain warranties are presumed under the UCC without explicit reference.

> no claim has been advanced by Prima Paint that F&C fraudulently induced it to enter into the agreement to arbitrate "[a]ny controversy or claim arising out of or relating to this agreement, or the breach thereof."

Prima Paint, 388 U.S. at 406. On the other hand, the Hills' complaint explicitly sets forth such allegations.

The *Prima Paint* doctrine holds that a court may inquire only into fraudulent inducement of the arbitration clause, but the arbitrator decides upon fraudulent inducement of the entire contract. This case is outside the doctrine for a very simple reason: This case does not concern fraudulent inducement of the entire contract. The contract for sale was based upon Gateway's offer of a Tenth Anniversary System containing specified components and plaintiffs' (and the class members') acceptance of that offer. The contract was completely performed at the time the arbitration clause arrived at plaintiffs' home. Had Gateway's performance complied with the contract, there would be no dispute. Gateway intentionally failed to perform and attempted to insulate itself from the consequences of its nonperformance by secreting an arbitration clause inside the shipping container without notice.

The Court of Appeals ignored the fact that two separate fraudulent schemes are at issue in this case. The subject matter of the lawsuit is the misrepresentation of the performance of specific components comprising the Tenth Anniversary System. If the Hills had explicitly agreed to the arbitration agreement at issue, there is no question that *Prima Paint* would control and that the misrepresentation would be a matter for arbitration. The Hills, however, specifically allege that Gateway fraudu-

lently attempted to materially alter the purchase agreement by sneaking in an arbitration clause that was not agreed to (and that abrogates substantial rights). This is fraud in the inducement of the arbitration clause, a matter which is for the courts to decide. *Prima Paint*, 388 U.S. at 406; *see also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974) ("an arbitration or forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion," *distinguishing Prima Paint*); *Hullum v. Sherbondy*, 1991 U.S. App. LEXIS 7826 (9th Cir. Apr. 23, 1991) (denying validity of arbitration clause inserted in a series of contracts for investment management when the facts demonstrated that the defendants did not in fact invest the plaintiff's money, and that the arbitration clause was designed to prevent investors from inquiring into the fraudulent scheme); *C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Securities Corp.*, 912 F.2d 1563, 1568 (6th Cir. 1990) (holding that arbitration clause in margin agreement was part of fraudulent scheme to induce plaintiff's assent to margin agreement and, by including arbitration clause, to coerce plaintiff into ratifying the unauthorized trading occurring in its accounts).

The Court of Appeals' citation of *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 238-42 (1987), is no more persuasive. In *McMahon*, the arbitration clause was part of an industry-standard account agreement between a securities brokerage and the customers. The customers filed a RICO suit alleging that their broker, an employee of the brokerage, had defrauded them through a pattern of unauthorized trading *after* they had entered into the account agreement. *McMahon*,

482 U.S. at 223-25. This Court held that, when there was no question that the parties had agreed to an arbitration clause and no allegation that the arbitration clause was itself fraudulently induced, a RICO claim falling within the language of the arbitration clause could be sent to arbitration. *Id.* at 238-42.

Those predicate facts are absent from this case. As discussed above, the Hills did not agree to an industry-standard arbitration agreement. They have also pleaded that the arbitration clause itself was induced by fraud, as part of a scheme to prevent redress for Gateway's completed prior misconduct (misrepresentation of the Tenth Anniversary System's components and capabilities). They do not complain that a RICO claim is not arbitrable *per se*, but that their particular RICO claim is not the subject of a valid and binding arbitration agreement. This is completely distinct from the issue in *McMahon* (whether a RICO claim can ever be arbitrated).

Prima Paint did not concern an arbitration clause imposed as an addition to an already-consummated contract. Gateway's attempt to add an arbitration clause to a consummated contract for sale emphasizes that the fraud induced the arbitration clause, not just the entire contract. *See Scherk*, *supra*, 417 U.S. at 519 n.14 ("an arbitration or forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion," *distinguishing Prima Paint*); *Prima Paint*, 388 U.S. at 403-04; *Hullum*, *supra* (denying validity of arbitration clause intended to cover up completed fraud).

Detailed examination of the arbitration clause and the underlying rules supports the conclusion that the arbitration clause is itself fraudulent. The arbitration clause requires all arbitrations to occur in Chicago, which is an unconscionable barrier to relief. Given the list price of approximately $4,000, and damages of approximately $1,000, a consumer who purchased the Tenth Anniversary System in, for example, Phoenix cannot travel to Chicago or pay for representation in Chicago.

The rules of the International Chamber of Commerce—the organization specified in the arbitration clause—also require each side to pay an arbitration fee in advance of over $2,000, which is approximately half the list price of the Tenth Anniversary System. Requiring the consumer to pay such a fee is unfair. *Cf. Cole*, *supra*, 105 F.3d at 1483-86 (holding that an employee need not agree to arbitrate pursuant to an employment contract requiring the employee to pay the arbitration fees). A $2,000 fee, while high, is not that unusual in a private arbitration. *See Cole*, 105 F.3d at 1480 n.8 (remarking on fees of $500-$600 per *hour*). And, by its failure to allow for class arbitration concerning standard practices or defects, such as those at issue in this case, the arbitration clause prevents consumers from joining together to efficiently seek redress through a single proceeding. *See Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 271 (7th Cir. 1995) ("absent a provision in the parties' arbitration agreement providing for class treatment of disputes, a district court has no authority to certify class arbitration").

The arbitration clause is not a legitimate attempt to resolve potential future disputes; it is an outrageous attempt by defendants to avoid liability for a completed fraud.

CONCLUSION

For the reasons stated, petitioners Rich Hill and Enza Hill respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-3294

RICH HILL and ENZA HILL, on behalf of a class of persons similarly situated,

Plaintiffs-Appellees,

v.

GATEWAY 2000, INC., and DAVID PRAIS,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 4086—Suzanne B. Conlon, *Judge.*

ARGUED DECEMBER 10, 1996—DECIDED JANUARY 6, 1997

Before CUMMINGS, HARLINGTON WOOD, JR., and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* A customer picks up the phone, orders a computer, and gives a credit card number. Presently a box arrives, containing the computer and a list of terms, said to govern unless the customer returns the computer within 30 days. Are these terms effective as the parties' contract, or is the contract term-free because the order-taker did not read any terms over the phone and elicit the customer's assent?

One of the terms in the box containing a Gateway 2000 system was an arbitration clause. Rich and Enza Hill, the

customers, kept the computer more than 30 days before complaining about its components and performance. They filed suit in federal court arguing, among other things, that the product's shortcomings make Gateway a racketeer (mail and wire fraud are said to be the predicate offenses), leading to treble damages under RICO for the Hills and a class of all other purchasers. Gateway asked the district court to enforce the arbitration clause; the judge refused, writing that "[t]he present record is insufficient to support a finding of a valid arbitration agreement between the parties or that the plaintiffs were given adequate notice of the arbitration clause." Gateway took an immediate appeal, as is its right. 9 U.S.C. §16(a)(1)(A).

The Hills say that the arbitration clause did not stand out: they concede noticing the statement of terms but deny reading it closely enough to discover the agreement to arbitrate, and they ask us to conclude that they therefore may go to court. Yet an agreement to arbitrate must be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. *Doctor's Associates, Inc. v. Casarotto*, 116 S. Ct. 1652 (1996), holds that this provision of the Federal Arbitration Act is inconsistent with any requirement that an arbitration clause be prominent. A contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome. *Carr v. CIGNA Securities, Inc.*, 95 F.3d 544, 547 (7th Cir. 1996); *Chicago Pacific Corp. v. Canada Life Assurance Co.*, 850 F.2d 334 (7th Cir. 1988). Terms inside Gateway's box stand or fall together. If they constitute the parties' contract because the Hills had an opportunity to return the computer after reading them, then all must be enforced.

ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), holds that terms inside a box of software bind consumers who use the software after an opportunity to read the terms and to reject them by returning the product. Likewise, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), enforces a forum-selection clause that was included among three pages of terms attached to a cruise ship ticket.

ProCD and *Carnival Cruise Lines* exemplify the many commercial transactions in which people pay for products with terms to follow; *ProCD* discusses others. 86 F.3d at 1451-52. The district court concluded in *ProCD* that the contract is formed when the consumer pays for the software; as a result, the court held, only terms known to the consumer at that moment are part of the contract, and provisos inside the box do not count. Although this is one way a contract could be formed, it is not the only way: "A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance." *Id.* at 1452. Gateway shipped computers with the same sort of accept-or-return offer ProCD made to users of its software. *ProCD* relied on the Uniform Commercial Code rather than any peculiarities of Wisconsin law; both Illinois and South Dakota, the two states whose law might govern relations between Gateway and the Hills, have adopted the UCC; neither side has pointed us to any atypical doctrines in those states that might be pertinent; *ProCD* therefore applies to this dispute.

Plaintiffs ask us to limit *ProCD* to software, but where's the sense in that? *ProCD* is about the law of contract, not the law of software. Payment preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors. Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. And oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions.

Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread. For what little it is worth, we add that the box from Gateway was crammed with software. The computer came with an operating system, without which it was useful only as a boat anchor. See *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.*, 73 F.3d 756, 761 (7th Cir. 1996). Gateway also included many application programs. So the Hills' effort to limit *ProCD* to software would not avail them factually, even if it were sound legally—which it is not.

For their second sally, the Hills contend that *ProCD* should be limited to executory contracts (to licenses in particular), and therefore does not apply because both parties' performance of this contract was complete when the box arrived at their home. This is legally and factually wrong: legally because the question at hand concerns the *formation* of the contract rather than its *performance*, and factually because both contracts were incompletely performed. *ProCD* did not depend on the fact that the seller characterized the transaction as a license rather than as a contract; we treated it as a contract for the sale of goods and reserved the question whether for other purposes a "license" characterization might be preferable. 86 F.3d at 1450. All debates about characterization to one side, the transaction in *ProCD* was no more executory than the one here: Zeidenberg paid for the software and walked out of the store with a box under his arm, so if arrival of the box with the product ends the time for revelation of contractual terms, then the time ended in *ProCD* before Zeidenberg opened the box. But of course ProCD had not completed performance with delivery of the box, and neither had Gateway. One element of the transaction was the warranty, which obliges sellers to fix defects in their products. The Hills have invoked Gateway's warranty and are not satisfied with its response, so they are not well positioned to say that Gateway's

obligations were fulfilled when the motor carrier unloaded the box. What is more, both ProCD and Gateway promised to help customers to use their products. Long-term service and information obligations are common in the computer business, on both hardware and software sides. Gateway offers "lifetime service" and has a round-the-clock telephone hotline to fulfil this promise. Some vendors spend more money helping customers use their products than on developing and manufacturing them. The document in Gateway's box includes promises of future performance that some consumers value highly; these promises bind Gateway just as the arbitration clause binds the Hills.

Next the Hills insist that *ProCD* is irrelevant because Zeidenberg was a "merchant" and they are not. Section 2-207(2) of the UCC, the infamous battle-of-the-forms section, states that "additional terms [following acceptance of an offer] are to be construed as proposals for addition to a contract. Between merchants such terms become part of the contract unless. . .". Plaintiffs tell us that *ProCD* came out as it did only because Zeidenberg was a "merchant" and the terms inside ProCD's box were not excluded by the "unless" clause. This argument pays scant attention to the opinion in *ProCD*, which concluded that, when there is only one form, "§2-207 is irrelevant." 86 F.3d at 1452. The question in *ProCD* was not whether terms were added to a contract after its formation, but how and when the contract was formed—in particular, whether a vendor may propose that a contract of sale be formed, not in the store (or over the phone) with the payment of money or a general "send me the product," but after the customer has had a chance to inspect both the item and the terms. *ProCD* answers "yes," for merchants and consumers alike. Yet again, for what little it is worth we observe that the Hills misunderstand the setting of *ProCD*. A "merchant" under the UCC "means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction", §2-104(1). Zeidenberg bought the product at a re-

tail store, an uncommon place for merchants to acquire inventory. His corporation put ProCD's database on the Internet for anyone to browse, which led to the litigation but did not make Zeidenberg a software merchant.

At oral argument the Hills propounded still another distinction: the box containing ProCD's software displayed a notice that additional terms were within, while the box containing Gateway's computer did not. The difference is functional, not legal. Consumers browsing the aisles of a store can look at the box, and if they are unwilling to deal with the prospect of additional terms can leave the box alone, avoiding the transactions costs of returning the package after reviewing its contents. Gateway's box, by contrast, is just a shipping carton; it is not on display anywhere. Its function is to protect the product during transit, and the information on its sides is for the use of handlers ("Fragile!" "This Side Up!") rather than would-be purchasers.

Perhaps the Hills would have had a better argument if they were first alerted to the bundling of hardware and legal-ware after opening the box and wanted to return the computer in order to avoid disagreeable terms, but were dissuaded by the expense of shipping. What the remedy would be in such a case—could it exceed the shipping charges?—is an interesting question, but one that need not detain us because the Hills knew before they ordered the computer that the carton would include *some* important terms, and they did not seek to discover these in advance. Gateway's ads state that their products come with limited warranties and lifetime support. How limited was the warranty—30 days, with service contingent on shipping the computer back, or five years, with free on-site service? What sort of support was offered? Shoppers have three principal ways to discover these things. First, they can ask the vendor to send a copy before deciding whether to buy. The Magnuson-Moss Warranty Act requires firms to distribute their warranty terms on request, 15 U.S.C. §2302(b)(1)(A); the Hills do not contend that Gateway would have refused to enclose the remaining

terms too. Concealment would be bad for business, scaring some customers away and leading to excess returns from others. Second, shoppers can consult public sources (computer magazines, the Web sites of vendors) that may contain this information. Third, they may inspect the documents after the product's delivery. Like Zeidenberg, the Hills took the third option. By keeping the computer beyond 30 days, the Hills accepted Gateway's offer, including the arbitration clause.

The Hills' remaining arguments, including a contention that the arbitration clause is unenforceable as part of a scheme to defraud, do not require more than a citation to *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). Whatever may be said pro and con about the cost and efficacy of arbitration (which the Hills disparage) is for Congress and the contracting parties to consider. Claims based on RICO are no less arbitrable than those founded on the contract or the law of torts. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 238-42 (1987). The decision of the district court is vacated, and this case is remanded with instructions to compel the Hills to submit their dispute to arbitration.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: January 6, 1997

BEFORE:

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

No. 96-3294

RICH HILL and ENZA HILL,

Plaintiffs-Appellees

v.

GATEWAY 2000, INCORPORATED and DAVID PRAIS,

Defendants-Appellants

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 96 C 4086—Suzanne Conlon, Judge

The judgment of the District Court is VACATED and the case is REMANDED, in accordance with the decision of this court entered on this date. The appellants shall recover costs.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 96 C 4086 Date: August 22, 1996

Name of Assigned Judge: SUSANNE B. CONLON

Case Title: Rich Hill, *et al.* v. Gateway 2000, Inc., *et al.*

* * * * *

DOCKET ENTRY:

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(10) ☒ [Other docket entry]
Defendants' motion to compel arbitration [16-1] is denied. (See reverse for details.)

/s/ Susanne B. Conlon

* * * * *

ORDER

Defendants Gateway 2000, Inc. and David Prais move to compel plaintiffs Rich Hill and Enza Hill to submit their claims arising from the purchase of defendants' computer system to arbitration. Filed as a class action on behalf of other purchasers, plaintiffs allege defendants breached the sales contract by the undisclosed "swapping" of advertised computer components, that defendants breached implied and express warranties, and that defendants engaged in racketeering and consumer fraud. In addition, plaintiffs seek a declaratory judgment that the arbitration clause in defendants' standard terms and conditions agreement is invalid because when the provision was "included in the contract," defendants intended to substitute advertised components. Complt. ¶¶ 90, 91. Plaintiffs further claim that the arbitration clause, which was enclos-

ed in the computer system's packaging, was not part of the contract. *Id.* ¶ 92.

It is apparently undisputed that the arbitration clause was neither negotiated by the parties nor included in any pre-delivery agreement. Rather, the arbitration clause was contained in a four-page form placed inside the packaging, which was not received by plaintiffs until the computer system was shipped to them. *See* Complt. Ex. C, ¶ 10. Defendants insist that plaintiffs are bound by the arbitration clause because an introductory notice on the form states in bold type that by keeping the computer system 30 days after delivery, the purchaser accepts all terms in the notice. *Id.* Ex. C at 1. Plaintiffs respond that there was no disclosure of an arbitration provision during the purchasing process, nor was there any indication on the outside of the packaging that the box contained an arbitration agreement. Plaintiffs assert they were unaware of the arbitration clause until some unspecified date when they discovered the computer system did not function as advertised. Rich Hill Decl. ¶ 1. Plaintiffs argue that the unfair manner in which purchasers are purportedly notified of the arbitration clause is part of a scheme to defraud.

The present record is insufficient to support a finding of a valid arbitration agreement between the parties or that plaintiffs were given adequate notice of the arbitration clause. *Compare Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585 (1991) (actual notice of forum-selection provision on passenger ticket conceded); *ProCD, Inc. v. Zeidenberg,* 86 F.3d 1447 (7th Cir. 1996) (notice on outside of computer software packaging that warranties and license restriction were inside).

/s/ Susanne B. Conlon

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 3, 1997.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

RICH HILL and ENZA HILL, on behalf of a class of persons similarly situated,

Plaintiffs-Appellees,

No. 96-3294 *v.*

GATEWAY 2000, INC., and DAVID PRAIS,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 4086—Suzanne B. Conlon, Judge.

Order

Plaintiffs-appellees filed a petition for rehearing and suggestion of rehearing en banc on January 21, 1997. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

9 U.S.C. §2

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §3

Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. §4

Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district

court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or an admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not an issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the manner in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.